MIAMI REVIEW — MIAMI, FLORIDA

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In the Supreme Court of the United States

October Term 1975

NO. 76-126

THE CHASE MANHATTAN BANK,
a New York banking association,
Defendant-Petitioner,

— against —

SAILBOAT APARTMENT CORP., a Florida corporation, CAROL HOUSING CORPORATION, a Florida corporation, STEPHEN KAPELOW, individually, PAUL KAPELOW, individually, and HESTER KAPELOW, individually, jointly, and severally,
Plaintiffs-Respondents,

and

RAYMOND T. O'KEEFE, ADAM C. HECK, GERALD W. BLAKELEY, JR., WILLIAM F. BUTLER, JR., FRANK F. FLYNN, JR., PETER C. HAEFFNER, JR., HARRY B. HELMSLEY, JAMES D. LANDAUDER, FREDERICK P. ROSE, and CHARLES M. WILLIAMS, as Trustees of CHASE MANHATTAN MORTGAGE AND REALTY TRUST, a Massachusetts business trust,
Defendants.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT

QUESTIONS PRESENTED

I.

WHETHER THE FLORIDA INTERMEDIATE APPELLATE COURT'S AFFIRMANCE OF THE TRIAL COURT'S INTERLOCUTORY ORDER WHICH DENIED PETITIONER'S MOTION TO DISMISS IS A FINAL JUDGMENT OR DECREE PURSUANT TO TITLE 28, U.S.C. §1257?

II.

WHETHER THE DECISION BELOW MAY BE UPHELD BECAUSE IT IS BASED UPON ADEQUATE STATE GROUNDS?

III.

WHETHER PETITIONER HAS ASSERTED A SUBSTANTIAL FEDERAL QUESTION?

IV.

WHETHER THE RECOGNIZED EXCEPTIONS TO THE NATIONAL BANK ACT ARE APPLICABLE TO THIS CASE AND SUPPORT THE DECISION BELOW?

STATEMENT OF THE CASE AND FACTS*

On November 11, 1974, Plaintiffs, Sailboat Apartment Corporation, Carol Housing Corporation, Stephen Kapelow, individually, Paul Kapelow, individually, and Hester Kapelow, individually, jointly and severally, filed this action against Chase Manhattan Bank and the trustees of Chase Manhattan Mortgage & Realty Trust, in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida.

The complaint, in five counts, alleges that the Defendants failed to fund approximately 21 million of a 24 million dollar construction and development loan for land located in Dade County, Florida. Defendant, Chase Manhattan Mortgage & Realty Trust, holds a mortgage on that land, which is located in the City of Hialeah, Florida.

The legal bases of the action are breach of contract, fraud, and usury. In addition to damages, Plaintiffs seek specific performance of the contract, as well as an injunction against foreclosure.

In essence, the suit seeks to preserve Plaintiffs' ownership of local property. That ownership is jeopardized by Defendants' failure to fund its commitment.

An interlocutory appeal was taken by Chase Manhattan Bank from the trial court's order of March 13, 1975, denying the Bank's motion to quash and dismiss for improper venue.

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*In this brief, the following symbol will be used:
(PB) Petitioner's Brief

On July 29, 1975, the Third District Court of Appeal of Florida denied the interlocutory appeal and affirmed the trial court's order denying the Bank's motion to dismiss.

On October 14, 1975, the Bank filed a petition for writ of certiorari in the Supreme Court of Florida. On April 30, 1976, the petition was denied for lack of jurisdiction.

The Bank's petition to this Court ensued.

ARGUMENT

I.

THE FLORIDA INTERMEDIATE APPELLATE COURT'S AFFIRMANCE OF THE TRIAL COURT'S INTERLOCUTORY ORDER WHICH DENIED PETITIONER'S MOTION TO DISMISS IS NOT A FINAL JUDGMENT OR DECREE PURSUANT TO TITLE 28, U.S.C. §1257.

It is axiomatic that in order to be final, a state court judgment or decree:

> . . . must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not merely interlocutory or intermediate steps therein. It must be the final word of a final court. *Market Street R.Co. v. Railroad Commission*, 324 U.S. 548, 551 (1944).

In the present case, the decision affirming the trial court's denial of Defendant's motion to dismiss Plaintiffs' complaint is merely interlocutory. The decision below has made no final disposition of the litigation or any part thereof. The sole effect of the decision affirming the denial of Defendant's motion to dismiss is procedural and clearly it is only an intermediate step in this litigation, requiring Defendant to answer Plaintiffs' complaint. Defendant is still free to assert its venue privilege under the National Bank Act as an affirmative defense which can be determined on its merits at trial or by summary judgment where facts can be applied to law.

In the present context, Defendant moved to dismiss Plaintiffs' complaint with prejudice solely as a matter of law on the grounds that the National Bank Act, Title 12 U.S.C. §94, exempts Defendant from being sued outside of the state in which it is established by law. However, the factual basis of Plaintiffs' complaint includes assertions which invoke recognized exceptions to the National Bank Act, Title 12, U.S.C. §94: waiver and the local nature of the action.[1] The Florida Rules of Civil Procedure require the allegations of Plaintiffs' complaint to be deemed true for purposes of determining the validity of a motion to dismiss. See, *e.g.*, *Cape Cave Corp. v. Adams Construction Corp.*, 256 So.2d 413 (2d Fla DCA 1972); *Cravero Home Building Co. v. Jaffe*, 142 So.2d 342 (3d Fla DCA 1962). Deeming the allegations in Plaintiffs' complaint true for purposes of testing Petitioner's motion to dismiss, the trial court properly denied Defendant's motion to dismiss.

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[1] A summary of the applicable exceptions to the venue act as they apply to this case are presented below at Pages 12-20.

Throughout its succession of appeals, Petitioner has been oblivious to the procedural nature of a motion to dismiss and to the requirement that the facts alleged in the complaint are deemed true for the purposes of the motion. Even its petition to this Court disputes facts rather than law, as is clear from Petitioner's argument that Plaintiffs' complaint was "unsupported" and "unverified". (PB 8-9).

In Florida, as under the Federal Rules of Civil Procedure, there is no requirement that a complaint be "supported" or "verified". Pursuant to Florida Rule of Civil Procedure 1.030, "the signature of an attorney shall constitute a certificate by him that he has read the pleading [and] that to the best of his knowledge, information and belief, there is good ground to support it".

In summary, the law is clear that where the order appealed from merely denied Defendant's motion to dismiss Plaintiffs' complaint, and made no final conclusive disposition on the merits, finality is lacking. See *McComb v. Commissioners*, 91 U.S. 1 (1876); *Meagher v. Minnesota Thresher Mfg. Co.*, 145 U.S. 608, 610-611 (1892); *Clark v. Kansas City*, 172 U.S. 334 (1898); *Missouri & Kansas R. Co. v. Olathe*, 222 U.S. 185 (1911); *Rutherford v. Fisher*, 4 Dall. (4 U.S.) 22 (1800). See also, *Cincinnati St. R. Co. v. Snell*, 179 U.S. 395 (1900).

In the face of the overwhelming authority cited above, Petitioner incorrectly cites 28 U.S.C. §1257(2) as its jurisdictional basis for a writ of certiorari where that subsection applies only to appeals regarding state statutes as opposed to writs of certiorari regarding federal statutes, and moreover, clings to *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963), as its sole case in support of jurisdictional finality. (PB 2). However, neither the statutory subsection nor the cited case is on point.

In *Mercantile National Bank, supra*, this Court ruled that the requisite finality existed where the question on appeal was "a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's causes of action". 371 U.S. at 558.

In that case, this Court found "a separate and independent matter" because the sole question was the purely legal issue of whether federal or state law applied:

> . . . it being agreed that the only issue for review was whether 12 U.S.C. §94 entitled appellants to have the action transferred to the state court in Dallas County or whether the state venue provision in §4(f) of the [Texas] Insurance Code was controlling . . . 371 U.S. at 557.

In *Mercantile National Bank, supra*, this Court resolved the venue dispute between federal and state law as a matter of law with a stipulation that there was no need to consider any factual issues. In addition, this Court's ruling in that case provided a final disposition of the venue issue.

In the present case Petitioner could not rest upon a pure legal demurrer and rely solely on the superiority of the federal statute as was the case in *Mercantile National Bank, supra.*

To the contrary, in the present case the venue issue is totally enmeshed in the factual dispute between the parties. Whether one accepts the allegations in Plaintiffs' complaint or Petitioner's contrary unsupported factual arguments cited above, the issue of waiver of the venue privilege is not a "separate and independent matter", but is totally dependent upon the facts of this case. Therefore, it is "enmeshed in the factual and legal issues comprising the plaintiff's causes of action" and should not be subject to piecemeal review by this Court until the factual issues regarding waiver are finally resolved — not on an appeal from a motion to dismiss. See *Republic National Gas Co. v. Oklahoma*, 334 U.S. 62, 67-69 (1947); *Radio Station WOW v. Johnson*, 326 U.S. 120, 123-124 (1944); *Cf., Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

Finally, it is respectfully submitted that any decision by this Court, finding Plaintiffs' complaint insufficient would not be definitive at this stage of the proceedings because Plaintiffs-Respondents could amend their complaint pursuant to the Florida Rules of Civil Procedure and satisfy the requirements of any or all of the recognized exceptions to the venue act.

Respondents suggest that this Court should not entertain this petition for certiorari on the grounds that there is no "final order or decree" pursuant to 28 U.S.C. §1257.

ARGUMENT

II.

THE DECISION BELOW MAY BE UPHELD BECAUSE IT IS BASED UPON ADEQUATE STATE GROUNDS.

In an effort to bootstrap itself into this Court's jurisdiction, Petitioner argues that the *per curiam* affirmance below is "impossibly" vague and prevents a determination of whether a federal question was actually decided. (PB 7). Therefore, Petitioner would have this Court impute the existence of a federal question where it is, at best, doubtful that one exists.

While Respondents might agree for purposes of argument that the full grounds of the decision below are in doubt, the law is clear that such doubt at this stage is fatal to Petitioner.

When the grounds of a decision are in doubt and the record deficient, Petitioner should obtain a certificate from the lower court reciting the grounds for the court's opinion. The certificate should be obtained in time to include it as part of the record filed simultaneously with the petition for writ of certiorari. See, *Ungar v. Sarafite*, 376 U.S. 575, 582 (1964); *Willner v. Committee on Character*, 373 U.S. 96, 102 (1963); *Honeyman v. Hanan*, 300 U.S. 14, 18 (1936); *Whitney v. California*, 274 U.S. 357, 360-361 (1926).

Assuming *arguendo* that both federal and non-federal questions are properly raised in the record but no opinion

is delivered, or the grounds of the judgment are ambiguous, there must be an affirmative showing by the Petitioner that a decision on the federal question was necessary to a determination of the cause. *Lynch v. New York ex rel. Pierson*, 293 U.S. 52 (1934); *Woods v. Nierstheimer*, 328 U.S. 211 (1945); *Phyle v. Duffy*, 334 U.S. 431 (1946).

Moreover, this Court has stated where adequate state grounds are asserted and appear reasonable, "petitioner, in order to establish our jurisdiction, must demonstrate that neither of these state grounds can account for the decision below". *Durley v. Mayo*, 341 U.S. 277, 281 (1955). See also, *Stembridge v. Georgia*, 343 U.S. 541, 547 (1951); *Ellis v. Dixon*, 349 U.S. 458, 459 (1954).

In the present case, Petitioner has made no attempt to meet its burden of showing that the determination of a federal question was necessary to the decision below. Additionally, Petitioner has made no attempt to reconcile the procedural context of the lower court's denial of its motion to dismiss, with its argument that a federal question was decided.

In short, from an ambiguous record and without seeking a certificate of clarification, Petitioner asserts that a federal question must have been decided by the appellate court in affirming the denial of its motion to dismiss. It is much more plausible that, under state law, the Court properly accepted the allegations of Plaintiffs' complaint as true, and found that the factual issues of waiver and estoppel must be decided before the federal question could be addressed.

Therefore, because the decision below may be upheld on independent and adequate state procedural grounds, this petition should be denied. See *Wood v. Chesborough*, 228 U.S. 672, 676-680 (1912); *West Chicago St. R. Co. v. Illinois ex rel. Chicago*, 201 U.S. 506, 579 (1905); *Chicago B. & Q. R. Co. v. People of Illinois ex rel. Commissioners*, 200 U.S. 561 (1906).

ARGUMENT

III.

PETITIONER HAS ASSERTED NO SUBSTANTIAL FEDERAL QUESTION.

As discussed previously, the decision below was a procedural ruling that did not necessarily bear upon any federal question.

In an effort to bootstrap itself into this Court's jurisdiction, Petitioner has presented a federal question which was not necessary to the decision below.

Where a federal question is "merely formal", it will be deemed insubstantial and is cause for dismissal of a petition for writ of certiorari. *Zucht v. King*, 260 U.S. 174 (1922); *Palmer Oil Corp. v. Amerada Corp.*, 343 U.S. 390 (1951).

A federal question is considered formal when the issues it raises are not disputed and already have been clearly decided by this Court. *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311 (1902).

In the context of the present case, there is no dispute that Title 12, U.S.C. §94 is a mandatory statute. However, it has long been recognized that waiver and the local nature of the action are exceptions to the application of the National Bank Act. See, *e.g.*, *Casey v. Adams*, 102 U.S. 66 (1880); and *Radzanower v. Touche Ross and Co., et al.*, — U.S. —, 96 S.Ct. 89 (June 7, 1976). (For more complete discussion of the application of the National Bank Act, see Point IV below).

Although Petitioner raises a "federal issue", there is no question to be resolved by this Court from this interlocutory decision below.

Therefore, this Petition should be denied for lack of a substantial federal question.

ARGUMENT

IV.

RECOGNIZED EXCEPTIONS TO THE NATIONAL BANK ACT ARE APPLICABLE TO THIS CASE AND SUPPORT THE DECISION BELOW.

Petitioner bases its entire argument on the premise that the venue provision of 12 U.S.C. §94 is mandatory, and that "the lower federal courts have been unanimous in construing Section 94 as requiring that national banks be sued only in the district in which they are established". (PB 6).

A. *Waiver is a Recognized Exception to the Application of 12 U.S.C. §94 and Supports the Procedural Decision Below*

Title 12 U.S.C. §94 provides:

> Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

It stands without citation that this statute is mandatory rather than permissive. However, it is equally well settled that the venue benefit conferred upon national banks by 12 U.S.C. §94 may be waived and such waiver will be considered on a case-by-case basis. *Charlotte National Bank v. Morgan*, 132 U.S. 141, 145 (1889); *Michigan National Bank v. Robertson*, 372 U.S. 591, (1963); *National Bank of North America v. Associates of Obstetrics and Female Surgery, Inc., et al*, — U.S. —, 96 S.Ct. 1632, 48 L.Ed.2d 92 (1976); *Radzanower v. Touche Ross and Co., et al.*, — U.S. —, 96 S.Ct. 89 (June 7, 1976). See also 1 ALR 3d 904 (1964), and Am. Jur., *Venue* (1st Ed.) §46.

As recently as June 7, 1976, this Court stated in *Radzanower v. Touche Ross and Co., et al., supra:*

> It has long been settled that the restrictive venue provisions of §94 can be *waived* by a defendant bank.

See, e.g., *Charlotte National Bank v. Morgan*, 132 U.S. 591, 594; *National Bank of North America v. Associates of Obstetrics and Female Surgery, Inc.*, — U.S. —. (Emphasis supplied at fn. 3)

On a case-by-case basis, many courts have examined the factual context of a particular bank's activities and determined that a bank has waived its personal venue privilege for all claims arising out of that limited activity. *Buffum v. Chase National Bank of N.Y.*, 192 F.2d 58 (7th Cir. 1951); *Dolgow v. Anderson*, 45 FRD 470 (E.D.N.Y. 1968); *Lapinsohn v. Lewis Charles, Inc.*, 240 A.2d 90 (Pa. 1968) (conduct of general banking business manifests intent to be found in the jurisdiction); *Central Bank v. Superior Court of Sacramento*, 106 Cal.App. 962 (Ct.App. 1973) (full service branch subjected bank to jurisdiction and venue); *Lichtenfels v. North Carolina*, 132 SE2d 360, 363 (bank accepted appointment as testamentary trustee held accountable in forum where will probated); and *County of Okeechobee v. Florida National Bank*, 150 So. 124, 126 (Fla. 1933) (bank waived venue privilege by contracting with local county commissioners).

In *Buffum*, *supra*, Chase Bank had obtained leave to transact business in Illinois for the limited purpose of executing trusts. The Seventh Circuit found a limited waiver of venue to the extent of the business which the bank transacted in Illinois. The court held there was no waiver of venue in that case only because the plaintiff's claim did not arise out of the trust business which the bank had transacted in Illinois.

Under the facts alleged in the case at bar, Chase Bank has waived its privilege to the extent of being sued on its

local transaction and simultaneous tortious conduct in Florida[2]. Defendant has not contested the fact that it was present (transacting business) for the purposes of jurisdiction in Florida in this case[3].

As alleged in Plaintiffs' complaint, negotiations in this transaction took place in Miami, Florida[4]. In December, 1973, Kevin McCullagh, an officer of Chase, travelled to Miami to inspect the site of the project. While in Miami, he approved the site and negotiated numerous aspects of the transaction with officers of Appellees, Carol and Sailboat. At that time, McCullagh also requested Sailboat to prepare a cash flow analysis of the proposed project in Miami, Florida.

On May 2, 1974, McCullagh again met with Sailboat's officers and approved the preliminary plans which were submitted by Sailboat. This meeting, once again, was held in Miami. At this meeting, McCullagh also authorized Sailboat to proceed to working drawings and final engineering on the revised plans. As noted in the complaint (Appendix, ¶¶11 and 25), all of these activities took place in Miami, Florida. Therefore, consistent with case law cited above,

[2]This is especially true since while Buffum, supra, related to the mere transaction of business, the case at bar is one of alleged actual fraud, deceit and usury.

[3]Defendant, Chase Manhattan Bank, has neither moved to dismiss on the ground of lack of in personam jurisdiction, nor has it asserted lack of jurisdiction in its answer to the complaint.

[4]On the interlocutory appeals from orders denying motions to dismiss, all allegations in Appellees' complaint are deemed true. Cape Cave Corp. v. Adams Const. Corp., 256 So.2d 413 (2d Fla DCA 1972); Cravero Home Bldg. Co. v. Jaffe, 112 So.2d 312 (3d Fla DCA 1962).

All factual assertions made in this brief are supported by Plaintiffs-Respondents' complaint which is annexed to this brief as an Appendix.

and with the facts alleged in Plaintiffs' complaint, Chase may have waived its venue privilege to the extent of being sued on this single, local transaction involving the intentional torts of fraud and usury.

A cogent summary of the applicable case law which should be applied is provided in a recent law review article:

> The rationale behind these cases [waiver of the venue privilege] is that, where a national bank avails itself of a jurisdiction outside of the state, county or town of its principal office for the purpose of transacting business there, it has manifested an intent to be found in that jurisdiction and to be liable for any conduct arising out of the business it has done. The venue privilege limited suits to the place where the bank is established simply because this was where the bank was "found" — its records were there. Thus, the restrictive venue provisions would be unnecessary where the bank, by its actions manifests an intent to be found in another place.
>
> * * *
>
> As noted earlier, where a national bank is conducting *extensive business in another jurisdiction, or a limited business with an intention to be found in that jurisdiction to the extent of that business, it should be held to have waived the venue privilege for suit on its business activities there.* 34 Geo. Wash. L. Rev. 777, 778 (Emphasis supplied).

Therefore, it is clear that the trial court could have based its procedural ruling denying Defendant's motion

to dismiss on the ground that under the alleged facts of this case, Chase Bank may have waived its venue privilege to the extent that it transacted business and committed intentional torts in Florida against Respondents.

B. *The Nature of the Action*

The local nature of this action also supports, but is not necessary to, the lower courts' decision.

In the early case of *Casey v. Adams*, 102 U.S. 66, 26 L.Ed. 52 (1880), Adams & Company sued Casey as the receiver of a New Orleans national bank. The cause of action was for equitable relief: an order to show cause why a mortgage should not be erased from the records.

The Court held that this action for injunctive relief between creditors of a common judgment-debtor:

> . . . was clearly local in its nature. *It related to property* in the Parish of La Fourche, which had been seized and sold under process of the district court of that parish. 102 U.S. at 68 (Emphasis supplied).

As in *Casey*, this action is clearly local in nature — it relates only to local property. Count five of plaintiffs' complaint seeks an injunction restraining foreclosure of land in Dade County, Florida, and the prayer seeks an injunction and other appropriate relief relating, *inter alia*, to the mortgage. Moreover, count three purposely requests specific performance of the loan agreement so that the local *res*, the land, may be preserved for the plaintiffs.

In addition, Defendant, Chase Manhattan Mortgage and Realty Trust, the bank's alleged alter ego, has counterclaimed for foreclosure. Under Florida venue law, foreclosure actions are "local" and must be heard in the county where the land is situated. *Georgia Casualty Co. v. O'Donnell*, 147 So. 267 (Fla. 1933); *Sales v. Berzin*, 212 So.2d 23 (4th Fla. DCA 1968); *Cohen v. Century Ventures*, 163 So.2d 799 (2d Fla. DCA 1964).

This "local nature of the action" exception to the federal venue statute has continued to be applied uniformly as the recognized law since *Casey v. Adams, supra.* It has been most recently applied in *Chateau Lafayette Apts., Inc. v. Meadowbrook National Bank*, 416 F.2d 301 (5th Cir., 1969). There, the court stated clearly that the National Bank Act does *not* apply in "an action 'to assert an interest in immovable property, or a right in, to, or against immovable property' ". The court went on to state:

> Moreover, the *effect* of the remedies sought in *Casey* and the one claimed here virtually were the same. In *Casey*, complete cancellation and erasure of secured mortgages on immovable property was sought; here, although the action arose under circumstances not exactly the same as those in *Casey*, total or partial cancellation, reformation, and erasure of a mortgage on immovable local property is sought. 416 F.2d at 304. (Emphasis supplied).

The effect of the remedy sought in the case at bar is the same as *Casey, supra*, or *Chateau Lafayette, supra.* It is a suit "to assert an interest in immovable property or a right in, to or against immovable property".

In holding that the "local nature of the action" exception to the National Bank Act applied in *Chateau Lafayette, supra*, the Fifth Circuit discussed the nature of a local action and summed up the relationship between the relief sought and the nature of the action:

> Each depends upon the other; and one of the primary effects, if Appellee ultimately prevails, will be upon the real property subject to the mortgage. 416 F.2d at 305.

Moreover, as this Court stated in *Michigan National Bank v. Robertson*, 372 U.S. 591, 594 (1963), a local action is "one to determine interests in property as its situs . . ." That effect is precisely the nature of the case at bar. If plaintiffs ultimately prevail, one of the primary effects of their judgment will be to enjoin defendants from foreclosing on the real property which is the subject of the mortgage in this action. In addition, that judgment will determine the interests in Florida property at its situs.

Chase Bank's argument that this case should be treated differently from *Casey* and *Chateau Lafayette* is untenable. In Florida, every prayer for relief is treated as a prayer for general relief. See Fla.R.C.P. 1.110(b), *Super Service Products Corp. v. North Store Corp.*, 214 So.2d 664 (3d Fla. DCA 1968); *Davidson v. Lely Estates, Inc.*, 330 So.2d 528 (2d Fla. DCA 1976). In the present case, Plaintiffs-Appellees have specifically prayed for general relief and, therefore, the court could in its discretion, grant "erasure of the mortgage from the public records" as was granted in the prior cited cases. This possibility demonstrates the absurdity of Defendant's argument,

which stresses the formal jurisdictional basis rather than substance. Erasure of a mortgage can be done only on the local public records at the situs of the property.

As a practical matter, even if the trial court were to deny Plaintiffs the technical relief of "erasure" and, therefore, necessitate dismissal under Chase Bank's view of the law, it would only serve to delay a decision on the merits, since Plaintiffs-Respondents could immediately refile this action and request the relief of "erasure". See e.g. *Chateau Lafayette, supra,* where Plaintiff's *amended* complaint sought erasure.

Therefore, it is not only clear legally that the applicable standard is the nature of the action rather than the relief sought or the formal jurisdictional basis, but it is also clear practically that the only result which could be obtained from reversing the lower courts' decisions in this matter would be to delay the action and require Plaintiffs to file an amended complaint.

CONCLUSION

This Court should deny this Petition for Writ of Certiorari on the grounds that there has been no final judgment or decree; the decision below may be upheld on adequate state grounds; Petitioner has asserted no substantial federal question; and recognized exceptions to the bank venue act are applicable to this case and support the decision below.

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Copies mailed to counsel, September 24, 1976.

APPENDIX

APPENDIX
Plaintiffs' Complaint

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION

NO. 74-32594

SAILBOAT APARTMENT CORP., a Florida corporation, CAROL HOUSING CORPORATION, a Florida corporation, STEPHEN KAPELOW, individually, PAUL KAPELOW, individually, and HESTER KAPELOW, individually, jointly and severally,

Plaintiffs,

vs

CHASE MANHATTAN BANK, a New York national banking association, RAYMOND T. O'KEEFE, ADAM C. HECK, GERALD W. BLAKELEY, JR., WILLIAM F. BUTLER, JR., FRANK F. FLYNN, JR., PETER C. HAEFFNER, JR., HARRY B. HELMSLEY, JAMES D. LANDAUER, FREDERICK P. ROSE and CHARLES M. WILLIAMS, as Trustees of CHASE MANHATTAN MORTGAGE & REALTY TRUST, a Massachusetts business trust,

Defendants.

COMPLAINT FOR COMPENSATORY AND PUNITIVE DAMAGES, FOR BREACH OF CONTRACT, FOR FRAUD, FOR SPECIFIC PERFORMANCE, FOR DECLARATION OF RIGHTS AND OTHER RELIEF

Sailboat Apartment Corp., a Florida corporation ("Sailboat"), Carol Housing Corporation, a Florida corporation ("Carol"), Stephen Kapelow, individually, Paul Kapelow, individually, and Hester Kapelow, individually, jointly and severally, sue Chase Manhattan Bank, a New York national banking association ("Chase"), Raymond T. O'Keefe, Adam C. Heck, Gerald W. Blakeley, Jr., William F. Butler, Jr., Frank P. Flynn, Jr., Peter C. Haeffner, Jr., Harry B. Helmsley, James D. Landauer, Frederick P. Rose and Charles M. Williams, as Trustees of Chase Manhattan Mortgage & Realty Trust, a Massachusetts business trust ("Realty Trust"), jointly and severally, and allege:

1. This is a claim for damages in excess of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs and for equitable relief.

2. Sailboat is a corporation organized and existing under the laws of the State of Florida, with its principal place of business in Florida, headquartered at 9200 South Dadeland Boulevard, Miami, Dade County, Florida; it is the wholly-owned subsidiary of Carol, and was formed initially in order to commence and prosecute the project noted hereafter.

3. Carol is a corporation organized and existing under the laws of the State of Florida, with its principal place of business in Florida, headquartered at 9200 South Dadeland Boulevard, Miami, Dade County, Florida.

4. Stephen Kapelow is sui juris and a citizen and resident of Miami, Dade County, Florida. At all times material to this Complaint, Stephen Kapelow has been president of Sailboat.

5. Paul Kapelow is sui juris and a citizen and resident of Miami, Dade County, Florida.

6. Hester Kapelow is sui juris and a citizen and resident of Miami, Dade County, Florida.

7. Chase is a national banking association with its principal place of business in New York, New York, and otherwise with its principal place of business not in Florida.

8. Raymond T. O'Keefe, Adam C. Heck, Gerald W. Blakeley, Jr., William F. Butler, Jr., Frank F. Flynn, Jr., Peter C. Haeffner, Jr., Harry B. Helmsley, James D. Landauer, Frederick P. Rose and Charles M. Williams are the Trustees of Realty Trust, which is a Massachusetts business trust purporting to have its principal place of business at One Boston Place, Boston, Massachusetts, but in any event with its principal place of business not in Florida.

9. In November, 1973, Carol submitted an "application for land acquisition, development and construction loan", annexed and made a part of this Complaint as Exhibit 1, to Realty Trust for $23,000,000 with which to acquire, develop and build "Sailboat Village", a 1008-unit condominium project to be located on Northwest 103rd Street in Hialeah, Dade County, Florida.

10. After extensive negotiations, both directly and indirectly through Pearce Mayer & Greer, Inc. ("PM&G"), a New York brokerage firm, all of which negotiations took place in New York, New York, or in Dade County, Florida, and none of which occurred in Boston, Massa-

chusetts, Realty Trust indicated that Realty Trust was willing to consider Carol's application, but requested Sailboat submit a "good faith" deposit of $100,000.

11. In December, 1973, Kevin McCullough, an officer of Chase, traveled to Miami to inspect the site of the project and, while in Miami, approved the site and negotiated numerous aspects of the transaction with officers of Carol and Sailboat. He requested and Carol provided a cash-flow analysis of the proposed project, which is annexed and made a part of this Complaint as Exhibit 2.

12. In reliance upon the foregoing, on December 19, 1973, Carol caused the City National Bank of Miami, Florida, to issue an irrevocable letter of credit in the amount of $100,000, payable to Chase (not to Realty Trust). This letter of credit is annexed as Exhibit 3 and made a part of this Complaint.

13. On December 20, 1973, Chase advised PM&G that Carol's application was approved but in the amount of $24,000,000 rather than $23,000,000. PM&G so informed Carol and Sailboat and the irrevocable letter of credit was mailed to PM&G for delivery to Chase on December 20, 1973.

14. On January 14, 1974, Realty Trust issued its commitment letter. A copy of the commitment letter is annexed as Exhibit 4 and made a part of this Complaint. The commitment letter itself annexed and incorporated Realty Trust's "general conditions of construction loan commitment", which is also a portion of annexed Exhibit 4.

15. The terms of the commitment by Realty Trust are set forth in outline as follows:

> "We agree to lend up to $24,000,000 . . . of which (a) $2,450,000 (the Land Loan) is to be advanced to finance the acquisition of the Premises, (b) up to $2,650,000 (the Land Development) is to be advanced for the construction and performance of the land development work . . . and (c) up to $18,900,000 (the Construction Loan) is to be advanced for construction on the Premises of . . . (the Improvements) consisting of (i) 1008 condominium units housed in 3- and 5-story elevator serviced buildings, and (ii) on-site parking for 1512 cars, all of which construction shall be undertaken in several phases and all of which construction shall be completed within 60 months."

16. The higher $24,000,000 figure was required by Chase and represented a $1,000,000 increase to the initial proposed interest reserve.

17. On or about March 12, 1974, Sailboat's officers made their only visit to Massachusetts, to a small suite of offices located at One Boston Place in Boston, Massachusetts, and with apparently authorized agents of Realty Trust, signed the following:

(a) Building Loan Mortgage, annexed as Exhibit 5 and made a part of this Complaint;

(b) Building Loan Agreement, annexed as Exhibit 6 and made a part of this Complaint;

(c) a Note labeled both "Construction Note" and "Land Loan Note" dated March 12, 1974, in the principal amount of $2,313,000 at 4½% over floating prime. A copy of the said note is annexed as Exhibit 7 and made a part of this Complaint.

18. In connection with the foregoing, Carol, Stephen Kapelow, Paul Kapelow and Hester Kapelow were induced to sign in Miami a 'Completion Guarantee' purporting in Paragraph 2

> "unconditionally [to] guarantee . . . the due performance of all . . . [Sailboat's] obligations under the Building Loan Agreement and the Mortgage, including its obligations for the payment of all legal and other costs or expenses paid or incurred . . . in the enforcement thereof against . . . [Sailboat] or us."

A copy of the said Completion Guarantee is annexed as Exhibit 8 and made a part of this Complaint.

19. At no time did either Paul Kapelow or Hester Kapelow travel to Boston or to New York in reference to this matter and they signed the papers set forth in the preceding paragraph in Miami, Dade County, Florida.

20. Both the Note and the Completion Guarantee incorporate the Building Loan Agreement by reference. Among other things, the Building Loan Agreement includes the following language:

> "The Land Development Loan shall further provide for the payment of Additional Interest in the

> amount of $100,000 if . . . [Sailboat] does not apply and qualify for all of the Building Loan."

21. Notwithstanding all of the foregoing, on March 12, 1974, Realty Trust declined to fund more than $2,313,000 previously noted, but represented that the remainder of the initial two phases of the loan would be funded shortly. In point of fact, the documents executed as noted in Paragraph 17 above constituted all of the documents necessary for closing the entire first two phases of the loan except for an additional promissory note (and routine, concomitant extension and consolidation agreements).

22. Even prior to the closing of the loan in March, 1974, and as early as January, 1974, Sailboat and Carol had come to the conclusion that a revised site plan with different configurations and a lower number of units would be more advantageous than that initially made a part of the application for funding. Chase was made aware of these conclusions as early as January, 1974, assented to them and requested revised cost breakdowns and revised site plan drawings.

23. After the loan closing, Sailboat complied with Chase's request for such revisions and in April, 1974, notified Chase that revised site plan drawings, preliminary architectural plans and revised cost estimates were ready for inspection. Chase responded that Kevin McCullough would be in Miami on May 2, 1974, to conduct such an inspection.

24. During April, 1974, contrary to the representations Realty Trust had made to Sailboat's officers, Chase insisted and demanded that interest on the initial land

acquisition loan be paid because Chase had represented to Sailboat's officers that the second phase or development loan would be closed in only a few weeks. Both because Chase had represented that the funding of the second phase was but a short time away and because Sailboat had no bargaining strength at the time, Sailboat was forced to agree to pay interest until the development loan was funded.

25. On May 2, 1974, McCullough met with Sailboat's officers and approved on behalf of Chase the preliminary plans submitted. At this meeting in Miami, McCullough also authorized Sailboat to proceed to working drawings and final engineering on the revised plans. Later in the day, McCullough advised Sailboat's officers that Chase's appraiser also approved the revised plans.

26. On May 3, 1974, in reliance upon Chase's instructions as aforesaid, Sailboat authorized and commenced work towards complete and final working drawings on the revised project.

27. On May 20, 1974, Sailboat mailed to Chase a revised cost analysis which had been requested by McCullough.

28. Thereafter, Chase's consulting engineers, DiStasio and Van Buren, during the months of May, June, July, August and September, 1974, erroneously and with great delay failed expeditiously to complete their approvals of the revised plans. Throughout the same period, Defendants otherwise continued both by direct representation and by omission to make a contrary statement to induce Sailboat to believe that both phases 2 and 3 would be funded. Sail-

boat not only forebore from seeking other funding but, by virtue of Realty Trust's first mortgage, was unable to obtain any other funding for the project.

29. On September 13, 1974, Chase arbitrarily and unilaterally decided that the $1,000,000 interest reserve which Chase itself had built into the $24,000,000 loan commitment was 'no longer sufficient" and indicated that an additional interest reserve would be required.

30. Despite Sailboat's complete performance of all conditions precedent and all of its obligations which Chase permitted it to complete, on October 4, 1974, Chase had not only failed to approve and commence funding on the construction loan but had failed to conclude the land development loan (or phase 2 of the commitment).

31. Chase's refusal to complete the funding of the land development loan (i.e. second phase) rendered Plaintiffs' acceptance of funding for the land acquisition loan (or first phase) not only uneconomical but financially disastrous. As Chase knew, Plaintiffs were required, in order to accept the land acquisition funding, to pay off favorable purchase money mortgage notes with low interest rates and good terms and to replace such loans with Chase's high interest rate land acquisition loan. Sailboat therefore found itself with a ruinously high debt load and with no ability to obtain additional funding for development from sources other than Chase, since second mortgage money or total refinancing had become prohibitively expensive. Sailboat was therefore rendered unable even to improve the land for resale and found (and finds) itself locked into a loss position from which it is unable to extricate itself without re-

quiring Realty Trust at least to complete the land development portion or second phase of Realty Trust's commitment.

32. As part of the March 12, 1974, transaction, certain funds were withheld by Chase and placed in an escrow account. On or before October 23, 1974, Chase demanded that $40,900 of that escrow account money be applied to the interest due on the land acquisition loan. By letter dated October 23, 1974, and annexed and made a part of this Complaint as Exhibit 9, Sailboat authorized Chase to use the escrow monies and apply the same towards interest on the loan, but Sailboat authorized the same without prejudice to its rights.

33. By letter purporting to be dated October 18, 1974, but not received until October 25, 1974, and annexed and made a part of this Complaint as Exhibit 10, notwithstanding the written authorization by Sailboat to apply escrow monies to interest as aforesaid, Realty Trust purported to accelerate and demand repayment of the entire loan previously funded to Sailboat.

34. Moreover, at all times material to this Complaint, Chase's actions and activities were so clearly on behalf of Chase itself rather than as a putative "advisor" to Realty Trust that it became clear that Realty Trust has been either formed or used or both by Chase as a sham entity to avoid application of national, New York, Massachusetts, and/or Florida laws. In fact, the entire loan transaction and breach of the same and all of the misstatements and omissions to make material statements to Plaintiffs are the direct responsibility of Chase and Chase and/or Realty Trust should be required to respond therefor.

COUNT I

CLAIM FOR BREACH OF CONTRACT

35. Plaintiffs reallege Paragraphs 1 through 34, inclusive.

36. At all times material to this Complaint, Plaintiffs performed all conditions precedent required of them by the contracts, or were directly and deliberately prevented from being performed by Chase and/or by Realty Trust.

37. As a result of Defendants' said breach of contract, Plaintiffs have suffered monetary damage in excess of $10,000,000.

38. Therefore, Defendants, jointly and severally, are liable to Plaintiffs for compensatory damages, pre-judgment interest, attorneys' fees and costs.

COUNT II

CLAIM FOR SPECIFIC PERFORMANCE

39. Plaintiffs reallege Paragraphs 1 through 38, inclusive.

40. Plaintiffs stand ready, willing and able to complete the said project, have no adequate remedy at law, and are entitled to have Defendants specifically and in good faith perform each and every obligation to fund the second and third phases of its said contracts.

COUNT III

CLAIM FOR FRAUD

41. Plaintiffs reallege Paragraphs 1 through 40, inclusive.

42. Moreover, at the time Realty Trust and its agents and servants, employees and representatives, all acting within the course and scope of their employment and authority, made the foregoing representations and inducements to Sailboat and to Carol and the Kapelows, Realty Trust's said agents (a) knew that the representations were false and that Realty Trust would and/or could not fund the Land Development Loan or the Building Loan, (b) did not know whether Realty Trust would or could honor its commitments under the said documents or (c) should have known if they did not know, that Realty Trust would not or could not perform as they represent it would.

43. As a result of Realty Trust's actions as aforesaid, Sailboat, having foreborne to obtain financing elsewhere, is now unable to obtain alternative financing and is left with ownership of undeveloped land subject to a first lien to Realty Trust in the amount of $2,450,000 at the excessive interest rate as aforesaid and is unable to proceed in any way with the projected "Sailboat Village" project.

44. As a result of Defendants' said breach of contract, Plaintiffs have suffered monetary damage in excess of $10,000,000.

45. Therefore, Defendants, jointly and severally, are liable to Plaintiffs for compensatory damages, pre-judgment interest, attorneys' fees and costs.

46. Defendants' said conduct was in gross disregard of Plaintiffs' rights, and Defendants are therefore liable to Plaintiffs for punitive damages.

COUNT IV

CLAIM FOR USURY

47. Plaintiffs reallege Paragraphs 1 through 46, inclusive.

48. In addition to the foregoing, the combination of the 4½% interest rate over floating prime, the $100,000 additional interest which appears to be asserted as due under the Building Loan Agreement and a floating prime itself in excess of 11½ to 12½%, has resulted in a contract by Sailboat to pay interest to Realty Trust at rates in excess of 15% in violation of Florida Statutes, Chapter 687, entitling Sailboat to the return of all interest paid on the said Land Loan. Moreover, as a result of the foregoing, Sailboat has lost its projected profits on the said development and stands in jeopardy of losing its entire investment.

49. As a result of Defendants' said breach of contract, Plaintiffs have suffered monetary damage in excess of $10,000,000.

50. Therefore, Defendants, jointly and severally, are liable to Plaintiffs for compensatory damages, prejudgment interest, attorneys' fees and costs.

51. Defendants' said conduct was in gross disregard of Plaintiffs' rights, and Defendants are therefore liable to Plaintiffs for punitive damages.

52. In addition to the foregoing and pursuant to Florida Statutes §687, Plaintiffs are entitled to require Defendants to refund and pay over to Plaintiffs all interest heretofore paid on that portion of the loan which has been funded.

COUNT V

CLAIM FOR INJUNCTION AND DECLARATION OF RIGHTS

53. Plaintiffs reallege Paragraphs 1 through 52, inclusive.

54. Should Defendants be permitted wrongfully to accelerate the said loan, wrongfully to refuse to fund the remaining portions of the said loan and to foreclose on the real property owned by Sailboat, Plaintiffs and each of them would suffer irreparable damage and are entitled to temporary and permanent injunctions against Defendants' threatened acceleration and foreclosure.

55. In the alternative and at the very least, Plaintiffs are in doubt as to their legal rights under the contracts referred to above and are entitled to a declaration of their rights under the same. Among other things, the Kapelows and Carol are in doubt as to any obligations they have or may have under Paragraph 2 of Exhibit 8 referred to in Paragraph 18 of this Complaint. Moreover, Sailboat

is in doubt as to any obligation it may have to respond for "Additional Interest" pursuant to that portion of Exhibit 6 referred to in Paragraph 20 of this Complaint.

WHEREFORE, Plaintiffs, jointly and severally, demand judgment from Defendants, jointly and severally, for compensatory damages in excess of $10,000,000, for punitive damages in excess of $10,000,000, for pre-judgment interest, for attorneys' fees, for costs, and in the alternative, for specific performance of Defendants' obligations to fund the entire $24,000,000 but at a rate not to exceed 15% pursuant to Florida public policy, as enunciated in Chapter 687, Florida Statutes, for declarations that Carol and the Kapelows have no obligation whatever under Paragraph 2 of Exhibit 6, or a declaration that no "Additional Interest" may be required to be paid under that portion of Exhibit 6 referred to in Paragraph 20 of this Complaint, for preliminary and permanent injunctions against foreclosure and acceleration, and for such other and further relief as may be meet and proper under the circumstances.

DATED this 11th day of November, 1974.

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By /s/ Guy B. Bailey, Jr.
Guy B. Bailey, Jr.